

was entitled to be paid for work undertaken from 23 June 2006 until 28 November 2006 at the minimum rate of pay of \$10.25 per hour worked. Ms Yeleswaran has now applied to the Authority for the following orders:

- Payment of all hours worked at \$10.25 per hour totalling \$9,638.23;
- Payment of annual holiday pay of \$578.29;
- Interest on the amounts sought;
- Penalties for non compliance pursuant to section 75 of the Holidays Act;
- Penalties for the non-production of wages and time records pursuant to section 229(3) of the Employment Relations Act;
- Costs.

[3] Mr Raymond Lal denies he employed Ms Raju from June until November 2006. Mr Lal says he employed Ms Raju for two weeks in November after her work permit had been approved by the New Zealand Immigration Service. Mr Lal says he made it clear to Ms Raju from the very start that she was not allowed to work for him until she had a work permit.

[4] The issues for determination are to establish whether Ms Raju was an employee and therefore entitled to receive the minimum wage and holiday pay; establish what amounts, if any, are outstanding, and consider whether interest and penalties should be payable.

Ms Raju's entitlement to minimum wages and holiday pay

[5] As a matter of public policy an employee who works in New Zealand despite not having the requisite work permit is still entitled to the protection of the Employment Relations Act and related employment legislation (see *Khan v Harun Ali (t/a Mod Fab*, unreported, 16 September 2002, T. Woods, AA278/02).

[6] Ms Raju has conceded that she was not legally entitled to work in New Zealand until November 2006. An Application for a work permit for Ms Raju, supported by a letter from Mr Lal together with a copy of a signed employment agreement, was sent to the New Zealand Immigration Service on 27 July 2006. In the

letter supporting Ms Raju's application for a work permit, Mr Lal requests urgent attention to the application for a work permit as "...we are piling up with work load."

[7] Notwithstanding that she had not received her work permit, Ms Raju says she worked from 23 June 2006 as a trial period and was then provided with a written offer of employment on 23 July 2006. Ms Raju says she had been told by Mr Lal that she should continue working until such time as her work permit was processed and that he would pay her after she received her work permit.

[8] Ms Raju told me that during the early stages of her employment she would get a ride to work with family and friends, but that from September 2006 she took a bus. Documents detailing the use of Ms Raju's bus card support her contention that she travelled each day from September 2006 on the bus in accordance with her evidence to the Labour Inspector and the Authority.

[9] Mr Lal has consistently maintained that Ms Raju did not undertake any work for him until November 2007 when she did one weeks work for which she was paid.

[10] I find that the evidence from the Labour Inspector and Ms Raju is to be preferred over that of the Respondent. Mr Lal, while maintaining Ms Raju had not undertaken any work for him, is recorded in the Labour Inspector's contemporaneous notes as having advised Ms Yeleswaram that Ms Raju should not be paid because her work was substandard.

[11] The only way for Mr Lal to know whether Ms Raju's work was substandard is if she had worked for him. He also told Ms Yeleswaram that Ms Raju was constantly interrupting the other full-time employee with questions as she was unable to work consistently. Again, this could only have occurred if Ms Raju was working regularly.

[12] I am satisfied on the balance of probabilities it is more likely than not that Ms Raju did undertake work for Mr Lal from 23 June – 28 November 2006, albeit she was in breach of her visitors permit. She is therefore entitled to the protection of the Employment Relations Act and related legislation.

Determination as to wages and holiday pay outstanding

[13] Concerns raised in the correspondence from Mr Sharma, including the Statement In Reply lodged on behalf of Glomax, questions the Labour Inspectors' ability to take a claim on behalf of Ms Raju. As advised to Mr Sharma at the investigation meeting Ms Yeleswaram, is a Labour Inspector appointed pursuant to the Employment Relations Act 2000. Section 228 of the Act authorises a Labour Inspector to commence an action to recover wages or holiday pay or other money payable by an employer to that employee under the Minimum Wages Act 1983 and/or the Holidays Act 2003.

[14] The Statement In Reply also raises concerns about the fact that the Labour Inspector compiled the claim based solely on the evidence of Ms Raju. Ms Yeleswaram was acting at all times in accordance with her statutory rights where an employer fails to keep or produce wages and time records and where that failure prejudices an employee's ability to bring an accurate claim (see section 132(1)).

[15] Ms Yeleswaram drafted an Arrears Schedule based on the information she had received from Ms Raju. After adjustments were made to the schedule, taking into account information received from Ms Raju, Ms Yeleswaram forwarded the schedule with a letter of claim on 25 March 2008 to Mr Lal. This was more than 12 months after the Labour Inspector had commenced her investigation into Ms Raju's complaint.

[16] Section 132 provides that for wage arrears claims the employee may call evidence to show a failure by the employer to keep proper records and that that failure prejudiced the employee's ability to bring an accurate claim. In those circumstances, the Authority may accept as proved the employee's claim unless the employer proves the claim to be incorrect.

[17] Pursuant to subsection (2), if I am satisfied the requirements of s.132(1) have been met, the burden then passes to Glomax to prove that the applicant's claims are incorrect.

[18] Mr Sharma submits that the Labour Inspector received the applicable wages, time and holiday record for Ms Raju, when in July 2008, Mr Lal's accountant provided copies of the wages and time record for Ms Raju, showing that she worked in November only and was paid for that time. I note that Ms Raju has denied receiving any money from Mr Lal at all for any work she had undertaken.

[19] As pointed out by Ms Bick, in her submissions, the penalties applying to employers contained in the Immigration Act 1987 provide little impetus for wages, time and holiday records to be maintained by employers who have employees who are working without a work permit as this would be tantamount to admitting they have employed someone unlawfully.

[20] A customer book was produced to the Authority at the Investigation Meeting. The Labour Inspector objected to the production of this book on the basis that, pursuant to section 232 of the Act, Mr Lal was prevented from producing such evidence due to his failure to comply with a notice from the Labour Inspector to produce wages, time and holiday records.

[21] Mr Lal says the Authority should take cognisance of the book as it shows that Ms Raju did not make any notes or other writings in the book, therefore proving that she did not work for him in the period June – November 2006.

[22] I am satisfied Ms Yeleswaram made a number of requests to see the customer book, the first as early as 15 March 2007. Sometime after July 2007 and during a conversation with him, Mr Lal advised the Labour Inspector he did not have the customer book any more. This is obviously untrue, given that the book was available at the investigation meeting. It was at that point that Ms Yeleswaram advised Mr Lal that she would therefore have no option, but to rely solely on Ms Raju's evidence.

[23] I am satisfied the Labour Inspector made every effort to secure the correct information from Mr Lal from the outset of her investigation. However, documents requested were not produced, or not available and she therefore had no option but to rely on the statements provided by Ms Raju. While Mr Lal was undergoing significant medical issues throughout the Labour Inspectors investigations, I am

satisfied the Labour Inspector made several attempts to engage both Mr Lal and his accountant in the investigation process, all to no avail.

[24] I consider the requirements of s.132(1) have been satisfied and, further, that pursuant to s.132(2) Glomax has been unable to discharge the burden of proving the claim is incorrect.

Mr Ramesh Lal trading as Glomax Super Tailors is ordered to pay to the Labour Inspector the sum of \$9,638.23 gross plus holiday pay of \$578.29 gross pursuant to section 131 of the Employment Relations Act within 28 days of the date of this determination.

Interest

[25] The Authority has discretion to award interest pursuant to clause 11 of Schedule 2 of the Employment Relations Act on outstanding wages and holiday pay. I am satisfied this is a case that warrants an award of interest for the period Ms Raju has been denied what is owed to her. The interest is to be calculated from the date of the Labour Inspector's letter of claim.

Mr Ramesh Lal trading as Glomax Super Tailors is ordered to pay interest on the outstanding wages and holiday pay at the rate of 6% commencing on 25 March 2008 until the amount is paid.

Penalty actions

[26] Ms Yeleswaram claims a penalty for non compliance pursuant to section 75 of the Holidays Act and a penalty for the non-production of wages and time records pursuant to section 229(3) of the Employment Relations Act.

[27] I am satisfied that the Labour Inspector did require Glomax to provide such records for Ms Raju. However, as set out earlier, I am satisfied no such records were in existence. This is a breach of the act. An employer allowing an employee to work

illegally opens itself up to claims for penalties such as this, where records can not be produced.

[28] The Notice Requiring Production of Wages, Time and Holiday Records issued to Mr Lal on 25 May 2007 clearly puts Mr Lal on notice that a penalty may be applied in circumstances where the requested documents have not been produced.

[29] I find that Mr Ramesh Lal trading as Glomax Super Tailors is liable to a penalty of up to \$5,000 for each breach.

[30] The circumstances of this case call for a significant penalty which I shall set as a global amount to cover both breaches.

Mr Ramesh Lal trading as Glomax Super Tailors is ordered to pay a penalty of \$3,000. Such payment to be paid to the Crown.

Costs

[31] The Labour Inspector shall have the lodgement fee on this application.

Mr Ramesh Lal trading as Glomax Super Tailors is ordered to pay to the Labour Inspector \$70.00 in reimbursement of the filing fee on this application within 28 days of the date of this determination.

Vicki Campbell
Member of Employment Relations Authority